No. 12914

United States
COURT OF APPEALS
for the Ninth Circuit

C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellant,*

vs.

KATHLEEN HUTCHENS, *Appellee.*

KATHLEEN HUTCHENS, *Appellant,*

vs.

C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellee.*

BRIEF OF CROSS-APPELLANT AND APPELLEE KATHLEEN HUTCHENS

Appeal from the District Court of the United States for the District of Oregon.

HON. GUS SOLOMON, *Judge.*

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JURISDICTIONAL STATEMENT

This case involves an action for damages in the sum of $75,974.41 for damages suffered by cross-appellant, Kathleen Hutchens, by the wrongful death of her husband, Dean Hutchens, deceased, in the course of his

employment by W. R. Francis, which involved risk and danger to decedent within the meaning of the Employers' Liability Law of the State of Oregon, Section 102-1601 to 102-1606, O.C.L.A., caused by the negligence of appellant C. D. Johnson Lumber Corporation (T. 9).

The District Court of the United States for the District of Oregon had jurisdiction of said cause by virtue of 28 USCA, Section 41, sub-division 1, as amended.

The complaint and agreed facts of the pre-trial order show cross-appellant Hutchens to be a citizen of the State of Oregon and appellant, C. D. Johnson Lumber Corporation, to be a corporation organized and existing under and by virtue of the laws of the State of Nevada, and that the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00. It is also admitted that cross-appellant Hutchens is the widow of said decedent, who left no children (T. 9, 10, 11).

On motion of appellant, C. D. Johnson Lumber Corporation, W. R. Francis was named a third party defendant. Thereafter pre-trial proceedings resulted in a pre-trial order being entered. On June 14, 1950, the Court ordered (T. 8) that there be separate trials in the case of Kathleen Hutchens v. C. D. Johnson Lumber Corporation and the case of C. D. Johnson Lumber Corporation v. William R. Francis. Thereupon, the case of Kathleen Hutchens v. C. D. Johnson Lumber Corporation was tried before a duly impanelled jury, which returned a verdict in favor of cross-appellant in the sum of $68,377.20. Thereupon, appellant C. D. Johnson Lumber Corporation filed a motion for a new trial and a

motion for a judgment notwithstanding the verdict, which were duly opposed by cross-appellant. Thereupon the Court, in a memo opinion of December 5, 1950 (T. 76) ordered:

> "I do not believe that the amount of the verdict is so disproportionate to plaintiff's loss as to establish passion or prejudice in a jury's deliberations or to be shocking to the Court's conscience. I also recognize that it is within the province of the jury to determine the amount of damages and that a trial Judge should only rarely and reluctantly disturb the jury's findings with respect thereto. However, I feel that when the verdict of the jury is clearly excessive it is the duty of the trial Judge to refuse to permit such an award to stand.
>
> "I have carefully considered all the evidence touching on damages and I believe that the verdict of the jury is excessive to the extent of $21,877.20. Therefore, if the plaintiff, on or before December 20, 1950, shall serve upon opposing counsel and file in this case a remittitur of that amount upon the verdict found and returned herein the motion for a new trial and for a judgment notwithstanding the verdict will be denied and overruled and a judgment based upon such verdict as reduced may be entered for the remaining sum of $46,500.00 with costs; but, if such remittitur is not so served and filed on or before December 20, 1950 the motion for a new trial will be allowed."

That thereafter, cross-appellant duly protested (T. 63) and objected to the said memo opinion and thereafter filed its conditional and limited remittitur (T. 66) of $21,877.20, in which cross-appellant continued to protest and object, and stating that the remittitur was filed without prejudice in the event the appellant appealed from the judgment entered pursuant to said con-

ditional remittitur to the rights of the cross-appellant to appeal the action of the Court in conditioning its order denying the motion for a new trial upon the filing of a remittitur. Thereafter the Court approved said conditional remittitur and judgment was entered at the direction of the Court (T. 71) in the sum of $46,500.00. Thereafter appellant filed its notice of appeal.

The Court of Appeals has jurisdiction on this appeal under Title 28 U.S.C.A., Section 1291.

Cross-appellant appeals from the order of the Court entering judgment in the sum of $46,500.00 instead of $68,377.20, the amount awarded by the jury, and upon the Court's order denying the motion for a new trial conditional upon the filing of a remittitur, and in failing to direct the entry of a judgment on the verdict, and in directing entry of a judgment on a verdict as reduced. (Note: In this brief "T" means and refers to the Printed Transcript of Record.)

COMBINED STATEMENT OF FACTS OF CROSS-APPELLANT AND APPELLEE, KATHLEEN HUTCHENS

Cross-appellant makes the following statement of facts for both her cross-appeal and for her answering appeal as a supplement to appellant's statement of facts to avoid undue repetition.

The cross-appellant-plaintiff as widow of the decedent (T. 9) brings this action under the Employers' Lia-

bility Act of the State of Oregon (T. 11). Substantially all of the facts in this controversy are undisputed, leaving principally before the court the question of their legal effect.

The facts as disclosed by the evidence are that the cross-appellant-plaintiff, aged 23 years (T. 174) was married to Dean Hutchens, aged 21 years, her high school sweetheart, on November 30, 1947 (T. 175). The deceased at the time of his fatal injury was employed by Francis, a small logging contractor, to haul logs at so much per thousand board feet with his own truck (T. 160). Francis at that time was operating under a contract with defendant C. D. Johnson Lumber Company (T. 277), to fall, buck, yard and haul a large block of defendant Johnson's timber (T. 281, 285). The logs were being delivered by Francis at Appellant Johnson Corporation's Log Dump at Toledo, Oregon. This dump was an integral part of C. D. Johnson's sawmill and logging operation (T. 9). Appellant Johnson Corporation had a large number of other logging contractors hauling logs to their Toledo log dump and boom grounds (T. 284).

Appellant Johnson Corporation's unloading dump, at their tidewater sawmill on the Yaquina River, which is also known as the Toledo Log Dump, consisted of three different large brow logs on a ramp above tidewater, which tidewater varied several feet with the ebb and flow (T. 122); said ramp or elevated roadway consisted of a main deck next to the brow logs upon which the loaded trucks or logging trains operated. There was an elevated deck next to said roadway located 3 or 4 feet

higher than the main deck; an unloading crane which was a reconverted Erie Shovel, mounted on caterpillar tractor treads, operated on the higher level (T. 122). The unloading crane was moved from brow log to brow log as appellant Johnson Corporation directed so that logs dumped into the water could be efficiently handled by appellant Johnson Corporation's boommen and scalers, who placed the logs in boomstick compartments in the water (T. 121, 123).

Appellant Johnson Corporation's log dump foreman, Clyde C. Vincent, testified (T. 112) "I am in charge of the boom crew there in regards to telling the men what time of day to come to work and planning the work to be done, how we are going to take care of the logs." This boom foreman stated that he was the person who determined which of the three brow logs would be used (T. 121). The company posted a set of working rules that all truck drivers and other workmen were bound to follow and which were enforced by the boom foreman (T. 262). The rules (T. 261; Def's Ex. No. 6) required all truck drivers, including the decedent, to leave their binder chains on their loads in a tightened condition until the sling lines were attached and made taut. The unloading operation at the dump was solely owned, maintained, controlled and operated by appellant Johnson Corporation, and no truck driver had any control directly or indirectly of the unloading operation.

Trucks could only be unloaded by appellant Johnson Corporation's employees operating its unloading crane. Thus as to unloading, the hours of the day, starting and stopping time, the days and the times such as holidays,

Saturdays and Sundays, when no work was done, was determined by the appellant Johnson Lumber Corporation, and to which all log truck drivers delivering logs to that dump had to conform (T. 10, 11, 112, 123). The average day saw 20 different log trucks dumping 80 loads of logs (T. 142). If more than one truck load had arrived at the dump to be unloaded simultaneously, the company determined the order of unloading and whose turn it was to be unloaded. When the Company determined which brow log was to be used (T. 121) all the drivers were directed to drive their loaded trucks to a spot indicated by appellant's unloading engineer. When the load reached this spot he stopped on a whistle signal from the unloading engineer. The driver then was required to descend, attach the sling lines to the hoisting cable, after which the unloading engineer tightened the sling lines, then the driver was required to release his cheese block that form a cradle for the logs to lie in and to take off his binder chains (T.124). The engineer was the sole person, so the log dump foreman testified, and the engineer admitted whose duty it was to see that all workmen were in the clear before he dumped the logs into the water (T. 138, 152). This included workmen who might be in the pond near the brow log as well as on the ground. The engineer then applied his power, which tightened and raised the sling lines, rolling the logs on the load from the truck over the brow log into the water. Then the truck driver was required to move his trailer under the hoisting hook, connect the trailer to the hoisting hook, disconnect his air lines and trailer, reset his cheese blocks, put his binder chains in

his cab, and enter his driving cab (T. 124). The appellant's engineer then raised the trailer into the air and at directions from appellant's unloading engineer, the driver backed his truck under the raised trailer to the right place to allow the engineer to lower the trailer onto the correct position on the truck to carry it (T. 133). The driver then returned to the woods for another load.

On August 19, 1949 at about 9 AM, Dean Hutchens arrived at the landing with a one-log load, the log being 52 inches in diameter, approximately 40 feet long, and weighing about 30,000 pounds (T. 10, 169). At the direction of the appellant's unloading engineer, he drove and stopped at a position under the hoisting hook of the unloading machine on the whistle signal (T. 10, 143). He then descended from his cab and attached the sling lines to the hook attached to the hoisting cable after which the engineer tightened the sling lines. He then released his cheese blocks and proceeded to loosen his binder chains. Binder chains on a many-log load are a single continuous chain, wrapped around the logs and fastened on the side away from the brow log. To remove the chain the driver unfastens the chain and then draws it to him in a pile as he stands by the side of his load. On a single-log load the chain must, of necessity, be arranged differently if it is to serve any purpose. One end of the chain is securely attached to the bunk block, then run over the log and fastened to the other end of the bunk (T. 143, 144). To free the chain it must be unfastened from both ends (T. 144). If the chain is left attached to the bunk on the brow log side when the huge, heavy log rolls off it might foul on the chain,

carrying the chain, the bunks, and could even carry the trailer into the water, causing great damage and making the driver dive for his log chain or lose a valuable and necessary part of his equipment. Having released his binder chain on the engineer's side of his load, the deceased signalled the engineer that he was going in between the load and the brow log to release the other end of the binder on his trailer (T. 145, 146). The log dump foreman sitting on a pile of lumber near the log-loaded truck, got up to see if workmen were in the clear (T. 119, 145). To do so he walked to a position where he could see down the brow log where decedent was releasing his chain. He attempted to excuse himself by saying he only looked to see if the pond was clear of workmen. To arrive at this spot he had to walk about 14 feet (T. 147) and then return about half that distance, when he signalled the engineer that all was clear. Then it became the duty of the unloading engineer to see that all workmen were in the clear, which he admitted he did not do. The 72-year-old engineer (T. 147) without looking to see if the deceased was in the clear, applied his power, rolled the 30,000 pound log off, crushing Dean Hutchens against the brow log (T. 148) and tumbling the log into the water.

It is admitted that the unloading premises and equipment were those of appellant Johnson Corporation and appellant alone maintained the dock and furnished the brow log, unloading crane, unloading engineer, boom foreman, and boommen (T. 155). The evidence further showed that the operation of the entire dump was under the direction of appellant's log dump foreman and the

actual unloading machine's operation under direction of appellant's unloading engineer. The evidence, uncontradicted, showed that Dean Hutchens had no right, power, or authority to direct any one connected with the unloading operation. He could not give orders to the unloading engineer, boom foreman, or scaler (T. 285, 286). He could not dictate the brow log to be used, the starting or stopping time of the unloading machine, nor was he permitted to operate the unloading machine himself if he were to wish to work when the unloading crew was not present. It was stipulated that Dean Hutchens had a right under a contract to be on the premises in delivering the logs (T. 171).

The unquestioned testimony also shows that decedent was 21 years old at the time of his death, with an admitted life expectancy of 44 years (T. 11). That he had a gross monthly income of approximately $1500 to $1800; that he had a net monthly income of approximately $300 (T. 175) over and above his monthly truck payments of $400 on his logging truck that was rapidly being paid for (T. 177). Testimony was given without being contradicted that a life annuity paying $1000 per year for a woman 23 years of age and a man 21 years old would have a present value or cost of $33,917.00 (T. 221). The evidence further showed that decedent was in perfect health, a good industrious worker, a good mechanic, having no bad habits, who did not drink or smoke, saved his money, and was working toward buying a farm (T. 178), and performed personal services for plaintiff of pecuniary value, including advice and counsel of the management of the business affairs of the family.

The jury was also permitted to examine decedent's income tax statements offered in evidence without objection (T. 176).

SPECIFICATION OF ERRORS

I.

The Court erred in failing to enter a judgment on the verdict in its entirety and in failing to grant plaintiff's motion for an order directing entry of judgment on the verdict in its entirety.

II.

The Court erred in making the order denying the motion for a new trial conditional upon the filing of a remittitur.

III.

The Court erred in denying the motion for reconsideration of opinion on motion for a new trial, and in failing to reverse such an opinion, and in failing to direct entry of a judgment on the verdict.

IV.

The Court erred in holding that the amount of the verdict was excessive and that such amount should be reduced, and in directing that unless a remittitur was filed a new trial would be granted.

V.

The Court erred in making its order directing entry of judgment on the verdict as reduced.

The Court then went on to say it believed the verdict to be excessive to the extent of $21,877.20 and directed that the plaintiff file a remittitur of said amount or that the motion for a new trial would be granted, further directing that if it were filed both motions of the defendant would be denied. Protest by exception was promptly taken by cross-appellant to this action of the Court. Later, and still under protest, the cross-appellant filed its conditional remittitur in the amount specified by the Court wherein it was specified "this remittitur is filed without prejudice in the event the defendant appeals from the judgment entered pursuant to such remittitur to the rights of plaintiff to appeal the action of the Court in conditioning its order denying the motion for a new trial upon the filing of such remittitur." This remittitur was approved by the Court and then filed, after which orders denying the motions for new trial and judgment notwithstanding the verdict were entered. Thereupon an order directing entry of judgment was entered stating that cross-appellant had filed her remittitur pursuant to the directions of the Court as a condition of denial of motion for new trial, which remittitur had been approved by the Court. The judgment was thereupon entered in the sum of $46,500 and also recited that the remittitur was approved by the Court.

The record is clear that at all times cross-appellant protested the condition requiring the remittitur and made the remittitur under protest and never at any time acquiesced in or voluntarily made the remittitur.

ARGUMENT

In order to expedite matters, considering the nature of this case, and not to be repetitious and unduly lengthen this brief, we believe that much of the same argument is applicable to all of the specifications of error in this case and we will, therefore, proceed with one argument.

(1) Where the judgment of the trial court does not follow the verdict, the court on appeal may correct the error and enter the judgment the trial court should have entered.

(a) *A conditional remittitur under protest is not a waiver or relinquishment of cross-appellant's right to appeal.*

The jury after careful consideration of the evidence and following the instructions announced by the Court, returned a verdict in favor of the cross-appellant and against the appellant C. D. Johnson Lumber Corporation in the sum of $68,337.20. The Court, thereafter, in its memo opinion, when considering plaintiff's motion for an order directing entry of judgment based upon the verdict of the jury and defendant's motion for judgment notwithstanding the verdict and for a new trial stated, "I do not believe that the amount of the verdict is so disproportionate to the plaintiff's loss as to establish passion or prejudice in the jury's deliberations or to be shocking to the Court's conscience."

Waiver is the voluntary relinquishment of a known right. There never at any time has been any waiver or relinquishment of the right to object by appeal or otherwise to the Court's action in requiring the remittitur on the part of the cross-appellant. It has been at all times the position of cross-appellant that when the jury's verdict was $68,377.24 and there was no error in the record, that in a diversity of citizenship case the Court was without power to demand a remittitur and without power to enter a verdict in any amount other than that found by the jury in the State of Oregon. The Court recognized that the remittitur was made under protest and that the right of appeal was reserved to question the power of the Court in its remittitur action when it approved the qualified remittitur. It is pointed out to the Court that voluntary remittitur cases would not apply to this situation. Cross-appellant contends that the situation is the same as in *Peerless Oil and Gas Co. v. Teas,* 138 S.W. 2d 637, wherein the appellate court, in a similar situation, stated that where a wronged plaintiff tenders a required remittitur under protest the appellate court should examine the case as to the correctness of the trial court's action and to render a judgment in the amount found by the jury, if the verdict was found to be not excessive under the facts in the case. (At page 642.)

(b) *Where the trial Judge had no legal right to require the filing of a remittitur, the purported remittitur is of no legal import and leaves the record as though none had been filed.*

It might be possible to contend that this Court should not disturb the trial court's action in rendering judgment for a less amount than that found by the jury because if the Court had been faced with the alternative of rendering judgment for the full amount or granting a new trial, it should have granted a new trial. However, a trial court can commit error in granting a new trial as well as any other official act. The fact that such a ruling is not considered a final judgment from which an appeal will lie would not prevent it from being legal error. In Oregon, an appeal would lie from an order granting a new trial. If the trial court would have committed error in granting a new trial in this case its threat to do so is not based on law or legal right and amounts to duress. In this case the Court recognized that its action in requiring a remittitur might be error so, in fairness to cross-appellant, approved the conditional remittitur preserving to cross-appellant the right to question the court's action on appeal.

Duress exists when a person does an act unwillingly in compliance with an unlawful threat in order to avoid loss of property. In *Ward v. Scarborough,* 236 S.W. 441, the Court said:

> "That there may be duress of property as well as person is now thoroughly established. Quoting *McGowen v. Bush,* 17 Texas 196, 201; *Oliphant v.*

Markham, 79 Tex. 543, 548, 15 S.W. 569, 23 Am. St. Reports 363.

"To constitute duress it is sufficient if the will be constrained by the commission's presentation of a choice between comparative evils as inconvenience and loss by the detention of the property, loss of property altogether, or compliance with an unconscionable demand. 9 RCL p. 723; *Harris v. Carey,* 112 Va. 362, 71 S.E. 551, Ann. Cas. 1913A, 1350.

"Duress of property cannot exist without there being a threat to do some act which the threatening party has no legal right to do, some legal exaction or some fraud or deception. The restraint must be illegal and such as to destroy free agency without present means of protection. 9 RCL Page 723; *York v. Hinkle,* 80 Wis. 624, 50 N.W. 895.

"The restraint, intimidation, or compulsion is sufficient if it induces the particular person claiming duress to perform some act which he is not legally bound to do, contrary to his will. There is no discrimination against the weak or timid. *Landa v. Obert,* 78 Tex. 33, 52, 14 S.W. 297; *First National Bank v. Sargent,* 65 Neb. 594, 91 N.W. 595, 59 L.R.A. 296, 301.

"The fact that duress in this instance was practiced by the Court would not make the 'consent' any more genuine. A judgment is a species of property growing out of but unlike the cause of action on which it is based and if trial courts can arbitrarily and unlawfully force reductions of judgments under the threat of wiping it out completely, without the litigant having any right to protest and have his protest reviewed, our jurisprudence is not accomplishing its proper function. It is a familiar rule that 'a bond which is wrongfully demanded under color of official authority or as a condition to some act, privilege or benefit to which the maker is entitled without bond, is void for duress.' 7 Tex. Jur. 67, 68."

It is suggested that the so-called remittitur filed by cross-appellant has no legal effect because the trial judge had no legal right to require that it be filed and that the action of the trial court in rendering judgment for less than $68,377.20, to which cross-appellant accepted, is an error apparent on the face of the record that this honorable court can and should correct.

Almost the same situation occurred in Peerless Oil and Gas Company v. Paul C. Teas, supra, and in the case of General Accident, Fire and Life Insurance Corporation v. Brundren, 283 S.W. 491, where the case was tried on special issues, the trial court indicated after the verdict was brought in that it considered as too large the jury's finding that plaintiff's capacity to labor in the future had been impaired 75% and the plaintiff's attorneys in this case filed what they termed a "remittitur" purporting to reduce the percentage of incapacity from 75 per cent as found by the jury to 50 per cent. The plaintiff failed to protest this action of the trial court or to except as to the judgment based thereon and give notice of appeal as was done by cross-appellant in the present case. In affirming the judgment of the trial court, the Commission of Appeals, in an opinion by Judge Short, said:

> "We do not believe that the action of the defendant in error, followed by the action of the trial court in rendering a judgment for a less amount than the verdict of the jury authorized, was in violation of the articles mentioned, since the instrument called a remittitur is of no legal importance, and, as said by the Court of Appeals in its opinion, the legal situation then can stand as if none had been filed. . . .

> "In this case, the record shows that the testimony did support a finding that defendant in error suffered a loss of 75 per cent of his normal capacity to labor, and therefore this finding of fact by the jury is definitely proven to have been the result of a proper exercise on the part of the authority to weigh the evidence and determine the facts therefrom. In other words, the finding of fact by the Court of Civil Appeals would authorize the reduction of a judgment based on the finding of fact by the jury that the defendant in error did suffer a loss of 75 per cent of his capacity to labor and the judgment of the District Court to this extent was not only erroneous but was prejudicial to the legal rights of the defendant in error, but for the fact that the latter seems to have acquiesced in the judgment rendered in his favor and is thereby estopped from claiming the benefit of the error committed by the trial court. (283 S.W. 494)."

As in our case, there is nothing to be purged and the Court violated the Constitution of the State of Oregon in rendering a judgment that does not conform to the pleadings, the nature of the case proved, and the verdict.

That the verdict was not excessive is shown by a survey of recent decisions appearing in 4 NACCA Law Journal, Nov. 1949; 5 NACCA Law Journal, p. 214; 6 NACCA Law Journal, November 1950.

The cross-appellant having complied with the Court's unlawful requirement under protest and having accepted the order requiring a remittitur and the judgment based thereon and the final judgment having provided that the same was without prejudice to the cross-appellant's right to complain of the amount of the remittitur ordered by the Court and cross-appellant having given notice of

appeal to said Court's action in reducing the judgment, this feature is squarely before this Court for review.

(2) If the amount of the excess cannot be separated and fairly ascertained a remittitur should not be ordered by a trial court.

Cross-appellant recognizes that the District Court is clothed with the responsibility and duty to grant new trials under many conditions and that as a general rule his action in regard to the matter will not be disturbed. Here the Court found no error in the record, no passion and prejudice in a jury's deliberations, but only that in the opinion of the Court the verdict was clearly excessive.

The rule has been uniformly applied where the Court can, with mathematical certainty, determine the amount of a correct verdict, it is its duty to save the parties the expense of a new trial to reduce an excessive verdict to the correct amount. But where the record does not make a mathematical determination possible in unliquidated damage cases, it should not substitute its opinion for that of the jury and enter a judgment for a lesser amount, but can only order a new trial. *Grand Trunk Western R. Co. v. H. W. Nelson Co., Inc.,* 118 F. 2d 252; Cyc. of Federal Procedure, 2nd Ed., Vol. 8, page 162, Note 91. The Court in such a situation finds in effect a failure of proof to sustain the full amount but sufficient proof to sustain the lesser amount. The evidence on damage in this case does not occupy a great deal of space in the record. The jury returned a verdict of $68,377.20, which included $974.71 the agreed dam-

age for funeral expenses. The jury was directed to take into consideration contributory negligence of the decedent and the pecuniary value to the cross-appellant of the loss of advice and counsel as to the business affairs of the family. The jury arrived at this figure from the evidence that decedent was 21 years of age at the time of his death, with a life expectancy of 42 years. That at the time of his death he was earning a gross income of $1500 to $1800 per month, with a net income of $300 per month over and above of $400 a month payments on the conditional sales contract of his truck. That a life annuity paying $1,000 a year for a woman 23 years of age, or a man 21 years of age, would have a present value of $33,917. The income tax record of the decedent for the year 1948 showed a net income of $1,256.28, and for the first 8 months of 1949 his net income was $2,127.59, which the Court in its memo opinion calculated to make him a yearly income for the year 1949 of $3,000.00. The evidence further showed the decedent was in perfect health, a good, industrious worker, a good mechanic, having no bad habits, who did not drink or smoke, saved his money, and was working toward buying a farm. It further demonstrated that he performed personal services having a pecuniary value for cross-appellant by way of advice and counsel as to the management of the business affairs of the family.

Sincere and honest effort has been made to discover a conceivable mathematical basis by which the Court could arrive at the figure of $21,877.20 as the figure by which the proof failed or the jury wrongfully exceeded, to no avail.

That there was substantial evidence to support the jury's verdict of $68,377.20 in the record is easily demonstrated. The actuary testified that the present worth of $1,000 for a woman 23 years old was $33,917. The annual income of decedent as shown by his income tax statements was approximately $3,000. Therefore 3 times $33,917 would give the present worth of $101,751. In addition to this the parties stipulated the damages due to funeral expense were $974.41. This does not add anything for the personal service and advice and counsel and management of business affairs of the family that has substantial pecuniary value, or the recognized fact that a man's income usually increases after he reaches the age of 21. But if the testimony of the wife is taken to the effect that he netted $300 per month plus $400 paid on his truck, or $700 per month, is used, we have a yearly income of $8400, which, on the basis of $33,917 for each thousand, gives a present worth of $284,902.80. This exhausts all of the testimony on damages, none of which was controverted. However, it must be remembered that the complaint limited the recovery of cross-appellant to $75,000 and funeral expenses. That the jury arrived at their verdict in a thoughtful and accurate manner, following closely the instructions of the Court, is demonstrated as follows: The evidence showed greater damage than was permitted under the complaint. Therefore, the jury started at $75,000.00, the amount to which the recovery was limited, and to this added the sum of $974.71, the agreed amount of the funeral expenses, which made a total of $75,974.71. Then the jury having determined that the decedent's own negligence con-

tributed 10% to his death, which was admitted by counsel in the argument, reduced this amount by $7,597.41, leaving $68,377.24, which is within 4¢ of the verdict of the jury. Diligent and exhaustive search of the record has failed to discover any evidence that would establish either a failure of proof for the sum found by the jury or proof that the pecuniary loss of cross-appellant was $21,877.20 less than that found by the jury, or was only no more than $46,500. It is apparent that the Court must have used some method to arrive at this figure to have been able to establish the excess down to the fine point of 20¢ but it is likewise apparent that to do so he was required to substitute his judgment for that of the jury and not being able to designate mathematically the overplus he erred in requiring a remittitur.

(3) United States District Courts cannot undermine by procedural requirements, a state rule which substantially affects the rights of the parties.

(1) The United States District Court, when enforcing a right arising under State law, may not take any action which affects substantive rights as given by State law and its constitution.

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.C. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938), as interpreted by:

Guaranty Trust Company of New York v. Grace W. York, 326 U.S. 99, 65 S.C. 1464, 89 L. Ed. 2079, 160 A.L.R. 1231 (1945).

Palmer v. Hoffman, 318 U.S. 109, 63 S.C. 477, 89 L. Ed. 645, 144 A.L.R. 719 (1943), both citing with approval:

Simpson v. Channel, 110 F. 2d 754, 128 A.L.R. 394 (1940) (First CCA).

See also: *Stoner v. New York Life Insur. Co.,* 311 U.S. 464, 61 S.C. 336, 85 L. Ed. 284 (1940).

The Simpson case, in discussing whether burden of proof is "substantive" or "procedural" says (128 A.L.R. at 398):

> "Therefore, inasmuch as the older decisions in the Federal courts, applying in diversity cases, the Federal rule as to burden of proof as a matter of 'general law', are found upon an assumption no longer valid since *Erie R. Co. v. Tompkins* . . . , their classification of burden of proof as a matter of substance should be re-examined in light of the objective and policy disclosed in the Tompkins case."

On the basis of the Guaranty Trust Company case, the Palmer case and the Simpson case, the American Law Institute in its 1948 Supplement to the Restatement of the Law of Conflicts of Law added the following note to the introduction to Chapter 12, part of which chapter distinguishes substance and procedure in the conflicts sense:

> "This chapter does not deal with the rules pertaining to the extent to which federal courts apply state law and conversely . . . because the solution of such problem is no part of Conflict of Laws."

(a) It is submitted that the true test of the rule behind the Tompkins decision has been stated by the United States Supreme Court in the Guaranty Trust case, where the Court said, in discussing burden of proof (326 U.S. at 109, 160 A.L.R. at 1237):

> "*Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between the State and Federal courts. In essence, the intent of the decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of the litigation, as it would be tried in a state court. The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal instead of in a State court a block away should not lead to a substantially different result. . . . Erie R. Co. v. Tompkins has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the Federal Courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties."

See also, Cyclopedia of Federal Procedure, 2nd Edition, Callaghan and Co., 1943, Sec. 716, which says, in part (page 383 of Vol. 3):

> "It is a fair, if not necessary, construction of that case that it commits the Supreme Court to the position that Congress is without power to declare what rules of substantive law shall govern the federal courts, and that neither Congress nor the Supreme Court has power to declare a state rule of substantive law to be other than the courts of the state have established it, nor can they undermine such a substantive rule or destroy it by procedural requirements."

The rules of civil procedure provide that they "shall neither abridge, enlarge nor modify the substantive

rights of any litigant". The Congress thus recognized the distinction between substantive law, which generally speaking creates, defines and regulates rights, and procedural law or adjective law, which prescribes the methods of protecting rights or obtaining redress for their revision (1 C.J.S. 1468; 52 C.J.S. 1026; 40 Words and Phrases, 524, Permanent Edition).

Erie R. R. Co. v. Tompkins, 304 U.S. 64 (1938), holds that in a diversity case a federal court must follow both the applicable stautory and court decision law of the state. The *Guaranty Trust v. York,* 326 U.S. 99 (1945), holds that when a federal court in the exercise of its diversity jurisdiction is called upon to adjudicate a "stated created right", it becomes to that purpose in effect only another court of the state, and it cannot substantially affect the enforcement of the rights as created by the state. In discussing the Erie case, it stated, "in essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court shall be substantially the same, so far as legal rules determining the outcome of the litigation, as it would be if tried in a state court."

In *Ragan v. Merchants Transfer Company,* 337 U.S. 530 (1949), where the effect of a state statute of limitations was in question, it was held in effect that where a claim arises out of state law, the federal court must ascertain if and to what extent it is limited, modified, or substantially affected by state law, and if there is any state law which substantially affects the claim it

must be applied regardless of whether, in the conventional situation, it is substantive or remedial in character. Moreover, if there is a conflict between the state law and the rules of civil procedure, the former, it would seem, would prevail. The court has further said, in *Woods v. Interstate Realty Co.,* 337 U.S. 534 (1949), that under the rule of *Erie v. Tompkins,* in a diversity case, if the courts of the state are closed to an action it may not be brought in a federal court. This rule was further extended, and by plain inference followed, in *Cohen v. Beneficial Loan Corporation,* 337 U.S. 541 (1949), where it is suggested that if the rules had in any material particular been in conflict with the state law, the latter would govern.

In the instant case, we can say that the action of the trial court was to materially de-limit and modify cross-appellant's right of action and right to recover by substituting its judgment for that of the jury, which action was contrary to state law.

(b) Further authority in support of cross-appellant's proposition is cited as follows:

Brown v. Western Railway of Alabama, 338 U.S. 294, ... S.C. ..... (1949), the converse of the present case was before the United States Supreme Court in a case where a state court was used to enforce a federal right arising under the Federal Employers' Liability Act. The trial court sustained a general demurrer to the complaint and dismissed the action. The state rule declared that such a dismissal was a bar to further action. Affirmed in the state appellate court. On appeal to the

U. S. Supreme Court, it was held that the state rule was not binding in this case. At p. 296, the majority of the court said:

> "The argument is that while state courts are without power to detract from 'substantive rights' granted by Congress in FELA cases, they are free to follow their own rules of 'practice' and 'procedure'. . . . A long series of cases previously decided, from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by the forms of local practice."

Brady, Administratrix v. Southern Railway Co., 320 U.S. 476, ... S.C..... (1943). Again a converse situation where an action under FELA was brought in a state court. A judgment for the plaintiff was reversed by the state supreme court on the ground that the evidence was insufficient to support the verdict of the jury. On appeal it was held (at p. 473):

> "Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states."

In *Palmer v. Moran,* 44 F. Supp. 704 (1942), the Federal District Court for the Middle District of Pennsylvania heard a diversity case arising out of an automobile accident in Pennsylvania. The Federal District court ordered a remittitur and quoted from a specific Pennsylvania statute as the basis for its authority to request such a remittitur.

In each of the following cases, a state created right

was being enforced in a Federal court because of the diversity of citizenship of the parties. In each case, the Federal court relied upon state law to govern when the question of sufficiency of evidence was at issue:

Gutierrez, et al. v. Public Service Interstate Transport Co., 168 F. 2d 678 (1948), 2d CCA.

General Acc. Fire & Life Assur. Corp., Ltd. v. Schero, et al., 100 F. 2d 775 (1947), 5th CCA.

Van Sant v. American Express Co., 169 F. 2d 355 (1947), 3rd CCA.

Moran v. Pittsburgh-Des Moines Steel Co., 166 F. 2d 908 (1948), 3rd CCA.

Waldron v. Aetna Casualty & Surety Co., 141 F. 2d 230 (1944).

Bergeron v. Mansour, 152 F. 2d 27 (1945), 1st CCA.

Carter v. Kurn, et al., 127 F. 2d 415 (1942), 8th CCA.

Walker v. Prud. Ins. Co. of America, 127 F. 2d 938 (1942), 5th CCA.

Cooper v. Brown, 126 F. 2d 874 (1942), 3rd CCA.

Sierocinski v. E. I. Dupont De Nemours & Co., 118 F. 2d 531 (1941), p. 534.

Lennig v. New York Life Ins., 122 F. 2d 871 (1941), 3rd CCA.

Allen v. Pa. R. Co., 120 F. 2d 63 (1941) 7th CCA.

Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), see 30 Or. L. Rev. p. 555.

Huddleston v. Dwyer, 322 U.S. 232 (1944).

(c) The effect of the Erie R. R. v. Tompkins doctrine was recognized by the Court of Appeals for the Ninth Circuit in *Covey Gas and Oil Co. v. Checketts, et ux,*

187 F. 2d 561 (1951), where the power of the Federal appellate court under the Federal rules and the power of the Idaho appellate court under Idaho rules happened to coincide. This court said:

> "The decisions cited above make it unnecessary to consider the contention of appealing cogency, that a jury-tried diversity suit based upon a liability based upon a state statute and not existing at common law is not a 'suit at common law' as that term is used in the Seventh Amendment. That contention involves the effect of Erie R. R. v. Tompkins. . . . ."

The Oregon Supreme Court has held that the right of action created under the Oregon Employers' Liability Act is a statutory cause of action which did not exist at common law. *Piukkula v. Pillsbury-Astoria Flour Mills,* 150 Ore. 304 (1935).

(2) The United States District Court, in an action brought under the laws of the State of Oregon based upon diversity of citizenship of the parties, is without power to set aside a verdict where there has been no error in the trial in a case involving unliquidated damages on the sole ground that the damages are excessive and the District Court is also without power to order a new trial on such grounds if the plaintiff fails to file a remittitur.

(a) By virtue of the provisions of Amended Article VII, Section 3, of the Constitution of the State of Oregon, a trial court cannot set aside a verdict for unliquidated damages on the sole ground that it is excessive unless the trial court can affirmatively say that there is no evidence to support such verdict.

Van Lom v. Schneiderman, 187 Ore. 89 (1949), holds:

> "In the State of Oregon, the Circuit Courts no longer have the power to set aside a verdict in an action for unliquidated damages on the ground that the verdict is excessive. . . . Article VII (a) 3 of the Constitution of Oregon governing this matter is not a grant of power through the Courts but a limitation of their power. . . ."

The Court went on further to quote from the Oregon Constitution as follows:

> " . . . and no fact tried by jury shall be otherwise re-examined in any court of this state unless the court can affirmatively say there is no evidence to support the verdict. . . ."

The same is true of the Supreme Court of the State of Oregon.

The Court then went on to say:

> "This last clause forbids re-examination of a fact found by a jury otherwise than by another jury (citation), and is transgressed every time that a court undertakes to revise or correct a jury's finding of fact. . . ."

Timmins v. Hale, 122 Ore. 24, 43 (1927).

Buchanan v. Lewis A. Hicks Co., 66 Ore. 503, 509, 512 (1913), in the denial for the petition on rehearing.

Gillilan v. Portland Crematorium Assoc., 120 Ore. 286, 296 (1927).

Dictum in *Hust v. Moore-McCormick Lines, Inc.,* 180 Ore. 409 (1947).

(b) Nor can a trial court in the State of Oregon, *under the same circumstances,* direct that a remittitur be submitted in lieu of an order for a new trial.

Gillilan v. Portland Crematorium Assoc., 120 Ore. 286, 296 (1927), in which a trial court sua sponte reduced a verdict as excessive where there was no error on the record. The Supreme Court of the State of Oregon at p. 296 stated that the Circuit Court had no such authority. See also *Van Lom v. Schneiderman,* supra.

It is contended that the language "revise or correct" is sufficiently broad and was intended to be sufficiently broad so as to cover the direction of a remittitur by the trial court in lieu of a new trial. Logically, once the premise is established, as it has been, that the trial court cannot set aside a verdict as excessive, it would be a non sequitur to argue that the trial court can still force a revision of the jury's findings through the demand for a remittitur. Considered from a practical standpoint, because of the known time delay, cost, and uncertainty of a new trial, to allow such a power to remain in an Oregon trial court, would be tantamount to a denial of the Constitutional protections found in Amended Art. VII, Sec. 3 of the Oregon Constitution.

(3) The failure of the United States District Court to recognize the dictates of the Amendment to the Constitution of the State of Oregon substantially affects the rights of the parties as they existed under the law from which they arose.

Hust v. Moore-McCormick Lines, Inc., 180 Or. 409. Where a right arising under a Federal statute was tried

by an Oregon court. On appeal the Oregon Supreme Court was asked to exercise powers granted to it by Amended Article VII, Section 3, of the Oregon Constitution. The Oregon court refused to exercise such powers in this case because it said the Oregon court must act in a manner similar to that in which a federal appellate court would act when reviewing the action of a federal court (quoting at p. 418 from *McCauley v. Pacific Atlantic Steamship Co.,* 167 Or. 80 (1941), a decision consonant with the argument in this brief). At pages 429-430, the Oregon court said that the relationship between the judge and jury was substantive in nature and that the amendment to the Oregon Constitution could not be followed under the guise that it was merely procedural for to do so would basically alter the rights of the parties.

See also: Cases and material cited under 1(a) above and

Judge Herbert F. Goodrich, Handbook of the Conflicts of Laws, 3rd edition, West Publishing Co., 1949, pp. 40-45.

SUMMARY

A conditional remittitur reserving unto cross-appellant the right to appeal the act of the Court in requiring it is not a waiver or relinquishment of cross-appellant's right to appeal. Further, the trial court had no legal right to require that a remittitur be made, so the purported remittitur is of no legal effect and leaves the record as though none had been filed. Where the amount

of the excess of the jury's verdict over the proof cannot be separated and fairly ascertained, the court erred in requiring a remittitur. United States District Courts cannot undermine by procedural requirements or otherwise a state rule that circuit courts of the State of Oregon no longer have the power to set aside a verdict in an action for unliquidated damages on the ground that the verdict is excessive unless the trial court can affirmatively state that there is no evidence to support the verdict. In all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of the litigation, as it would be if tried in a state court. A trial court can commit error in granting a new trial or threatening as an alternative to require remittitur. The Court should correct the trial court's error and direct that judgment be entered to conform to the verdict of the jury.

Respectfully submitted,

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